

1979 WL 42879 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 21, 1979

**\*1 RE: Appointed Counsel For Post Conviction Matters**

The Honorable O. V. Player, Jr.  
Clerk of Court  
Sumter County Courthouse  
Sumter, S. C. 29150

Dear Mr. Player:

This is to acknowledge receipt of your recent letter asking advice with respect to the appointment of attorneys to represent indigent petitioners in Post Conviction Relief proceedings. I am sorry that I have been unable to respond earlier to your inquiry.

The Post Conviction Act, [Section 17-27-10, 1976 Code](#), and the Rules promulgated by the Supreme Court thereunder, specifically provide that the Court should appoint counsel to represent an indigent petitioner if there is a hearing to be held or if there is any question which would require the assistance of counsel. The Defense of Indigents Act, [Section 17-3-10 of the 1976 Code](#) and the Rules promulgated thereunder also provide that counsel appointed in Post Conviction proceedings may submit vouchers for payment pursuant to the schedule contained in that statute. Sumter County has only recently formed a Defender Corporation and retained a full-time attorney as Public Defender. It appears from the papers which you provided me that the rules for the Defender Corporation for Sumter County prohibit the attorneys from handling Post Conviction Relief cases. I was very surprised to read that and I don't believe any other Defender Corporation has such a rule. There certainly doesn't appear to be any rational explanation for such a rule. Several of the attorneys that have been appointed to represent indigent petitioners in Post Conviction matters pending in Sumter County have, subsequent to the notice of their appointment, taken issue with that appointment on the grounds that there are no funds available to compensate them and further that if there were funds available, that the compensation provided by the Defense of Indigents Act was not adequate or reasonable compensation.

Your letter does not set out any specific inquiry, but you merely ask for our comment concerning the issues which have been raised: As previously pointed out, the statutes clearly contemplate the appointment of counsel to represent indigent petitioners in Post Conviction proceedings. The Public Defender is still a member of the County Bar Association. He would, therefore, in our opinion, be subject to appointment to represent Post Conviction petitioners the same as any other attorney who is a member of the Sumter County Bar. Irrespective of the rules of the Corporation, I believe that the Public Defender would be required to carry his share of the load in representing these indigent petitioners.

This matter has been a cause for some concern in other circuits. The matter is handled differently depending on the particular circuit. The Public Defenders in most of the circuits have taken the position that because of their work load they simply cannot take on the additional burden of representing all indigent applicants. Additionally, some of them very naturally have raised a question of a conflict of interest when the basis of the Post Conviction complaint is inadequate representation and the attorney against whom the complaint is directed was the Public Defender or one of his assistants. In those circuits where the resident judge as a matter of course appoints the Public Defender to represent Post Conviction applicants, some still appoint the Public Defender and impose the burden on the Public Defender or the directors of the Corporation to make arrangements to acquire outside representation for those petitioners with whom there is a conflict in being represented by the Public Defender. In other circuits when such a conflict occurs, the resident judge simply appoints a member of the Bar. In circuits such as Richland where the Public Defender has complained of the additional work load, the resident judges appoint members of the Bar from

an alphabetical listing. The attorneys in the Public Defender's Office are required to take a certain number of these cases where they did not represent the petitioner at trial.

\*2 In those cases where the Public Defender is not appointed and a private member of the Bar is appointed to represent these petitioners, I believe some sort of Order would be appropriate in that they will need some official record of their appointment in order to proceed on appeal as an indigent. I believe the Defense of Indigents Act requires that record of appointment. I do not believe, however, that an official Order of the Court is necessary. The Court may by any manner of writing appoint an attorney so long as there is some written record of the appointment. I am enclosing copies of letters and Orders employed by the judges in the Fifth, Ninth and Thirteenth Circuits simply as an example of how it is done in these other circuits.

With respect to the complaint that the compensation provided by statute is insufficient or that the funds provided are exhausted or not available, I frankly have very little sympathy. Cannon 2 of the Code of Professional Responsibility in EC2-25 states: Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . .

In sum, it is my opinion that members of the Bar are obliged pursuant to the Code of Professional Ethics to accept appointments to represent indigent persons, whether that be in General Sessions Court or Common Pleas Court. The attorneys employed by the Public Defender Corporation are members of the County Bar and would also be obliged to perform this service. Some written evidence of the appointment is required; although I do not believe a formal Order would be necessary.

I hope this has been responsive to your inquiry and that I have answered the questions about which you were concerned. If there is anything further, please do not hesitate to let me know.

With kind regards,

Yours very truly,

Emmet H. Clair  
Deputy Attorney General

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